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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 69505-3-1

IN THE COURT
OF THE STATE OF WASHINGTON
DIVISION I

TANYA L. BEVAN,

Respondent,

vs.

CLINT and ANGELA MEYERS, husband and wife,

Appellants.

BRIEF OF APPELLANTS

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INTRODUCTION

In 2012, Respondent Tanya Bevan sought to quiet title in a slice of property that the Petitioners, Clint and Angela Meyers, had cleared and dug a well on in 2008. The Meyers counterclaimed for Bevan's intentional interference with their use and enjoyment of their property, where Bevan had repeatedly affirmed – to Clint Meyers and others – that the Meyers' western boundary (and Bevan's eastern boundary) is an obvious tree line roughly 125 feet west of the Meyers' 2008 well. Bevan did not deny that she had repeatedly acknowledged this boundary.

Instead, Bevan filed an anti-SLAPP motion, claiming that the Meyers' counterclaim was really based on a third party's report to the King County Health Department, which denied final approval for the Meyers' well. The trial court erroneously granted Bevan \$10,000 in fines, and roughly \$19,000 in costs and attorney fees.

But the anti-SLAPP statute does not apply here. This is a private boundary-line dispute, and the gravamen of the Meyers' counterclaim is Bevan's acquiescence, not a public concern or anyone's First Amendment rights. In any event, Bevan failed to meet her burden of proof, while the Meyers met theirs. This Court should reverse and remand for trial of the underlying claims.

ASSIGNMENTS OF ERROR

1. The trial court erred by applying RCW 4.24.525, the anti-SLAPP statute (the "Act").
2. The trial court erred in concluding that Bevan showed by a preponderance of the evidence that the Meyers' counterclaim was based on an "action involving public participation and petition" under the Act. CP 144.
3. The trial court erred in concluding that the Meyers failed to show by clear and convincing evidence a probability of prevailing on their counterclaim. *Id.*
4. The trial court erred in denying the Meyers' request for discovery under RCW 4.24.525(5)(c). CP 121, 143-45.
5. The trial court erred in striking the Meyers' counterclaim "insofar as they [*sic*] pertain to communications with the Health Department." CP 144.
6. The trial court's application of the Act violated the Meyers' fundamental right to due process. *Id.*
7. The trial court erred in awarding Bevan \$10,000 under RCW 4.24.525(6). *Id.*
8. The trial court erred in awarding Bevan costs and attorney fees under RCW 4.24.525(6). *Id.*; CP 256-61.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Act even apply to this private dispute?
2. Where, as here, the Meyers' original counterclaim sought damages for Bevan's intentional interference with their use and enjoyment of their property, and the Meyers amended their counterclaim to remove references to a third party's communications with the health department, did Bevan meet her burden to show that the Meyers' counterclaim was based on an "action involving public participation and petition"?
3. Is the Meyers' uncontroverted evidence that Bevan repeatedly acknowledged the true boundary line between the properties clear and convincing evidence showing a probability of prevailing on the Meyers' counterclaim?
4. Did the trial court err in denying the Meyers' request for discovery under RCW 4.24.525(5)(c)?
5. Did the trial court's application of the Act deny the Meyers fundamental due process?
6. Did the trial court err in granting Bevan fees, where her motion for fees was untimely under CR 54?
7. Should this Court award the Meyers attorney fees and costs on appeal?

STATEMENT OF THE CASE

- A. This private boundary-line dispute between adjacent landowners began when Bevan sued the Meyers for damages in trespass, waste, and to quiet title, and the Meyers counterclaimed for damages and to quiet title, where Bevan had specifically acknowledged the existing, well-delineated boundary line.**

On March 27, 2012, Bevan filed a law suit against the Meyers. CP 1. Bevan alleged that the Meyers had felled trees, dug a well, and otherwise trespassed upon a portion of her 40-acre, undeveloped, rural property outside of Duvall, which abuts the Meyers' 35-acre parcel; she sought damages and quiet title in the affected property. CP 1-7, 22, 47. The Meyers answered in July 2012, denying Bevan's claims, asserting various defenses, seeking quiet title in the now-developed property, and bringing a counterclaim for damages arising from Bevan's wrongful interference with their use and enjoyment of property. CP 9-20.

The Meyers had been planning, working on, and building a new home on their parcel over 12 years. CP 130. During this process, several people had confirmed that their western boundary (which is Bevan's eastern boundary) was marked by the end of the tree growth on the Meyers' property, where Bevan had clear-cut her parcel years before, leaving a line of stumps on her property. CP 128-29, 134-35. The Meyers' predecessor in interest, realtors, and

governmental agencies, all confirmed for the Meyers that this was the boundary line. CP 128-29. Most importantly, Bevan herself confirmed that this was the boundary line. *Id.*

Her most recent boundary confirmation was on June 25, 2011, when Bevan – who had blatantly trespassed on the Meyers' property numerous times before – showed up at the Meyers' home-construction site with what seemed to be a potential buyer for her own property. CP 128-29. The Meyers had posted their property and specifically asked Bevan not to come onto it due to the dangers presented by the large trucks and rigs coming and going around their home site. CP 128. Clint Meyers nonetheless allowed the buyer to see Bevan's property, specifically pointing out the tree line as the property line, roughly 125-feet west of the Meyers' new well. *Id.* Bevan specifically confirmed that the tree line was the boundary between the Bevan and Meyers properties. CP 128-29.¹

Nowhere in this record does Bevan deny that she repeatedly confirmed this boundary line to the prior owner of the Meyers' property, to her potential buyer in 2011, and to Clint Meyers. This is the basis for the Meyers' counterclaim at issue here.

¹ Clint Meyers sent Bevan an email that same day, reiterating his insistence that she stop trespassing on the Meyers' property. CP 132.

B. About a month after the Meyers answered, Bevan initiated a Special Motion to Strike under RCW 4.24.525, the anti-SLAPP statute.

In August 2012, Bevan filed a declaration in support of a Special Motion to Strike the Meyers' counterclaim under RCW 4.24.525, the anti-SLAPP² statute (the "Act"). CP 47-50. She asserted that after the Meyers had done considerable work clearing the undeveloped property, installing a well, and building their new home, she had her property surveyed by Ed Anderson. CP 48. She alleged that Anderson's survey proved the Meyers' well was "19 feet" onto her property. *Id.*

She also noted that Anderson had contacted the Seattle & King County Health Department ("KCHD") about the Meyers' well. CP 48. Anderson told KCHD's Ken Elliot that the Meyers' well encroaches onto Bevan's property "18 feet." CP 55. KCHD ultimately would not approve the Meyers' use of the well due to Bevan's assertion of ownership. CP 134. But Bevan averred, "I did not ask Mr. Anderson to contact the Health Department." CP 48.

Nonetheless, Bevan alleged that the Meyers' counterclaim for her intentional interference with their use of their land is actually based on Anderson's communications with KCHD. CP 49. She

² "SLAPP" is an acronym for "Strategic Litigation Against Public Participation."

further asserted that she should not have to defend against this claim because Anderson's communications with KCHD are protected by the First Amendment. *Id.* Essentially, she asserted that the Meyers' counterclaim is not based simply on Bevan's interference with their use and enjoyment of their property, but rather was "retaliation" for Anderson's exercise of free speech. *Id.*³

C. The Meyers denied all of Bevan's claims, clarified that their counterclaim was based on Bevan's interference with their quiet use and enjoyment of their land, and even amended their counterclaim.

On the contrary, the Meyers' original counterclaim specifically alleges that Bevan intentionally interfered with their use and enjoyment of their property by making a false claim of ownership, not by contacting KCHD (CP 11, 17, ¶ 12.5):

In making her claim of ownership to the property on which defendants' well is located, the plaintiff intentionally sought to interfere with defendants' use of the well, their home and their real property, and to cause defendants to suffer damages relating to that loss of use.

The paragraph right above this one in the Answer (¶ 12.4) mentions the communications with KCHD (by either Bevan or her "agents") that caused KCHD to revoke its permission to allow the Meyers to occupy their home (which they still cannot), but the gravamen of the

³ Bevan made additional allegations that, while irrelevant here, unfortunately must be addressed below.

Meyers' counterclaim is obviously Bevan's false claim of ownership, not Anderson's communications with KCHD. *Id.*

But the Meyers did not sue Anderson, even though they knew that he had initiated the communications with KCHD's Ken Elliot. Elliot forwarded Anderson's email to the Meyers' contractor, Jeff Amman, who forwarded it to Clint Meyers, in October 2011. CP 52-54. Interestingly, Elliot responded to Anderson that when the Meyers' well was dug in 2008, a covenant was recorded to "accurately reflect the well location," which is "104 [feet] East of the West line of" the Meyers' property. CP 54.

Unfortunately, Clint Meyers became very upset when he saw Anderson's email. CP 127. Anderson had falsely accused him of removing survey stakes and threatening Bevan, apparently based on claims Bevan made to Anderson. *Id.*; CP 55. Meyers made several statements in his reply email reflecting his opinion that Bevan, who is apparently Russian, might have connections to a Russian crime syndicate. CP 52-53. Meyers acknowledges that these statements were inappropriate and expressly apologized for making them. CP 126-27. These statements plainly have nothing to do with Bevan's Special Motion. It is difficult to conceive of a good reason why Bevan would attach them to her declaration.

In any event, after receiving Bevan's motion in August 2012, the Meyers amended their counterclaim in September 2012, eliminating any reference to communications with KCHD, but leaving unchanged the original allegation (quoted above) regarding Bevan's false ownership claims. CP 110.

D. The trial court struck the Meyers' allegations regarding communications with KCHD, sanctioned them \$10,000, and months after this appeal was filed, awarded Bevan attorney fees and costs of roughly \$19,000.

In response to Bevan's motion, the Meyers asserted that (1) the statute does not apply to this private dispute; (2) Bevan failed to prove that the Meyers' claim was based on an action involving public participation and petition; (3) due process requires (and the statute allows) the Meyers to have discovery; and (4) even if the original counterclaim contained an allegation that should be stricken, the gravamen of their counterclaim is Bevan's false assertion of ownership, so the counterclaim should not be entirely stricken. CP 114-22. The Meyers also asked the court to strike Bevan's improper references to an Offer of Settlement, and her irrelevant references to her own damages and the "email chain." CP 122-24. The Meyers sought attorney fees and costs where, as here, the statute simply does not apply. CP 124-25.

On September 28, 2010, the Honorable Laura Gene Middaugh granted Bevan's Special Motion, striking the Meyers' counterclaim only "insofar as they [*sic*] pertain to communications with the Health Department" – notwithstanding that any reference to those communications had already been removed from the counterclaim. *Compare* CP 144 with CP 110. She granted Bevan \$10,000 under the statute, plus attorney fees and costs. CP 144.

The Meyers appealed on October 25, 2010, under RCW 4.24.525(5)(d) (establishing right of immediate expedited appeal). CP 149-54. Almost two months later – fully three months after the trial court entered its order – Bevan filed her Motion for Establishment of Costs and Attorney Fees on Plaintiff's Special Motion to Strike, seeking \$18,967.50 in fees and \$109.69 in costs. CP 155-62. The Meyers objected that this request was far too late under CR 54 (10 days to file fee request). CP 213-15. They also made detailed objections to numerous aspects of the request, including the use of block-billing and billing for irrelevant and duplicative work. CP 215-22. The trial court concluded that CR 54 "does not apply," granting every penny Bevan initially requested. CP 256-61. The Meyers' appeal on the merits brings this order up on appeal automatically. RAP 2.4(g).

ARGUMENT

A. The standard of review is *de novo*.

The interpretation and application of the Act are reviewed *de novo*. *Eugster v. City of Spokane*, 139 Wn. App. 21, 33, 156 P.3d 912 (2007). Findings are reviewed for substantial evidence. *In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

B. The Act does not apply to this purely private property-line dispute, which is based on Bevan's wrongful assertion of ownership, not on a public concern, nor on anyone's public participation or petition.

The trial court erred in applying the Act to a portion of the Meyers' counterclaim. The Act applies only where, unlike here, the claim (including the Meyers' counterclaim)⁴ is based on an assertion of the right to free speech. But the Meyers' counterclaim is based on Bevan's wrongful assertion of ownership of the Meyers' property, intentionally interfering with their use and enjoyment of their land. This is not a matter of public concern at all, much less the sort of issue to which the Act was meant to apply.

Under the Act, the Legislature is "concerned about lawsuits" that deter participation in matters of public concern. Laws of 2010, ch. 118, § 1. It created the Special Motion procedure

⁴ The 2010 Act includes counterclaims. See RCW 4.24.545(1)(a) ("Claim" includes counterclaims).

in RCW 4.24.525 to “[s]trike a balance between the rights of persons to file lawsuits . . . and the rights of persons to participate in matters of public concern.” *Id.* The legislature also expressly provided that the statute is to be “applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” *Id.* at § 3 (emphasis added); ***Aronson v. Dog Eat Dog Films, Inc.***, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010).

Aronson is a quintessential application of the Act. Filmmaker Michael Moore had used Aronson’s video and song about Eric Turnbow, without permission, in Moore’s film *Sicko*, which addresses the health-care crisis. 738 F. Supp. at 1108. Among other things, Aronson asserted two state law claims: Invasion of Privacy (unauthorized distribution of the home video), and Misappropriation of Likeness (exposing his likeness without his consent for pecuniary gain). *Id.* The Federal District Court granted Moore’s Special Motion to Strike for reasons discussed *infra*.

But crucially here, ***Aronson*** makes clear that the Act “applies to claims ‘based on’ speech or conduct ‘in furtherance of the exercise of the constitutional right of . . . free speech in connection with an issue of public concern.’” 738 F. Supp. at 1110.

Specifically, the issue is “*whether the plaintiff’s cause of action itself is based on an act in furtherance of the defendant’s right of free speech.*” *Id.* (emphasis added) (citing ***City of Cotati v. Cashman***, 29 Cal. 4th 69, 78, 124 Cal. Rptr. 2d 519, 52 P.3d 695 (2002)).⁵ “In other words, *the act underlying the plaintiff’s cause, or the act which forms the basis for the plaintiff’s cause of action, must itself have been an act in furtherance of the right of free speech.*” *Id.* at 1110-11 (emphases added) (citing ***Equilon Enterprises v. Consumer Cause, Inc.***, 29 Cal. 4th 53, 66, 124 Cal. Rptr. 2d 507, 52 P.3d 695 52 P.3d 685 (2002)).

Here, the act on which the Meyers’ counterclaim was based – from its inception – was Bevan’s intentional interference with the Meyers’ use and enjoyment of their property (CP 11, 17):

In making her claim of ownership to the property on which defendants’ well is located, [Bevan] intentionally sought to interfere with defendants’ use of the well, their home and their real property, and to cause defendants to suffer damages relating to that loss of use.

⁵ The Act is substantially similar -- but not identical – to California’s anti-SLAPP statute, so Washington courts should look to California law as guidance in those instances where the language is the same. *Cf.* 738 F. Supp. at 1110; *see generally*, Tom Wyrwich, Comment, *A Cure for a “Public Concern”*: *Washington’s New Anti-SLAPP Law*, 86 WASH. L. REV. 663 (2011) (“public concern” in our Act is different than “public interest” in the California Act, so should be interpreted differently).

This paragraph appears in the original Answer and Counterclaim (CP 11), the first amended Answer and Counterclaim (CP 17), and the second amended Answer and Counterclaim (CP 110). It plainly is the gravamen of the Meyers' counterclaim, but the trial court did not strike this paragraph under the Act. CP 144.

Thus, the Act does not apply here. The trial court agreed that the Meyers' counterclaim survives Bevan's motion. The action on which their counterclaim is based – Bevan's wrongful assertion of ownership – is not itself in furtherance of Bevan's right of free speech, or even of Anderson's right to report. The Meyers' counterclaim was not based on Anderson's report. Had the Meyers wished to attack his reporting, they would have sued Anderson. The Act does not apply to their property dispute with Bevan. This Court should reverse and remand.

Below, Bevan relied upon *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697 (1994), which involved a public controversy. Gilman was planning to develop a tract in Issaquah, and was in the processes of seeking public approval. 74 Wn. App. at 735. MacDonald wrote several letters to county officials that were not true, claiming that the developer had illegally cleared 20 to 22 acres of land. *Id.* Gilman sued for defamation, disparagement, and intentional

interference with a business relationship. *Id.* at 736. This Court applied common-law defamation standards to his claim and found that he had not carried his burden of proof. *Id.* at 740. ***Gilman*** clearly falls within the intended protections of “public participation” in “public controversies.” This case does not.

C. Bevan failed to prove by a preponderance of the evidence that the Meyers’ counterclaim was based on her (or anyone’s) “public participation and petition.”

Assuming *arguendo* that the Act applies here, the trial court erred in concluding that under RCW 4.24.525(4)(a), Bevan met her burden of proof to show that the Meyers’ counterclaim was itself based on Bevan’s (or anyone’s) “public participation and petition.” From the outset, this counterclaim was based on Bevan’s intentional interference with the Meyers’ use and enjoyment of their property, and that counterclaim was not stricken. CP 11, 17, 144. Bevan thus failed to meet her burden.

A party moving to strike a claim under RCW 4.24.525(4)(a) has the initial burden of showing by a preponderance of the evidence that the claim targets protected activity – *i.e.*, activity “involving public participation and petition” as defined in RCW 4.24.525(2). Under RCW 4.24.525(2)(b), acts involving “public participation and petition” include (in relevant part):

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

...

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

And again, “the act underlying the plaintiff’s cause, or the act which forms the basis for the plaintiff’s cause of action, must itself have been an act in furtherance of the right of free speech.” **Aronson**, 738 F. Supp. at 1111.

Bevan did not show that the Meyers’ counterclaim was based on any such communications. Indeed, where (a) the trial court limited its order striking (only “insofar as” the counterclaim “pertains to communications with the Health Department”), and (b) the Meyers had already amended their counterclaim to remove any reference to Anderson’s communications, the actual counterclaim (Bevan’s intentional interference with their use and enjoyment of their property, CP 11) remained intact. The trial court did not

“strike” the counterclaim, but rather struck a factual allegation. Bevan thus failed to prove by a preponderance of the evidence that the Meyers’ counterclaim itself was based on anyone’s public participation or petition. This Court should reverse.

D. The Meyers provided clear and convincing evidence of a probability of prevailing on their counterclaim regarding Bevan’s wrongful assertion of ownership, contrary to the boundary line she herself pointed out.

Assuming *arguendo* that Bevan met her initial burden, that shifted the burden to the Meyers “to establish by clear and convincing evidence a probability of prevailing on” their counterclaim. RCW 4.24.525(4)(b). Decisions under this provision must be based on the “pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” RCW 4.24.525(4)(c). The Meyers met this standard, so the trial court erred in granting the Special Motion to Strike.

The Meyers provided *uncontroverted* evidence that Bevan had acknowledged the true boundary line roughly 125 feet west of the Meyers’ well – the tree line marked by the stumps where she stopped cutting down trees – to the Meyers’ predecessor in interest, to Clint Meyers, and to Bevan’s potential buyer. CP 128-29, 134-35. Bevan nowhere denied this. This evidence, if

believed, plainly meets the clear and convincing test: it has long been the law that Bevan may not assert her survey where the Meyers have justifiably relied on her own boundary-line assertions. See, e.g., **Darnell v. Noel**, 34 Wn.2d 428, 431-32, 208 P.2d 1194 (1949).⁶ In sum, the Meyers presented ample evidence of a probability of prevailing. Again, this Court should reverse.

E. At the very least, the Meyers were entitled to discovery.

Under RCW 4.24.525(5)(c), the trial court may order that specified discovery or other hearings or motions be conducted, notwithstanding the automatic stay imposed by the statute. The Meyers specifically requested this relief. CP 121. The simple fact is that the Act imposes a significant risk of violating counterclaim defendants' fundamental right to due process by summarily shifting a heavy burden of proof onto them while denying them any discovery.

Where, as here, the Meyers specifically alleged that Bevan had affirmed their boundary line numerous times, the Meyers should have been afforded an opportunity to conduct discovery, including deposing

⁶ Citing, *inter alia*, **Lawson v. Vernon**, 38 Wash. 422, 80 P. 559 (1905); **Thompson v. Huston**, 17 Wn.2d 457, 135 P.2d 834 (1943); **Dixon v. MacGillivray**, 29 Wn.2d 30, 185 P.2d 109 (1947); see also **Hoel v. Rose**, 125 Wn. App. 14, 18, 105 P.3d 395 (2004) (whether a party justifiably relied on a boundary misrepresentation is a question of fact) (citing **ESCA Corp. v. KPMG Peat Marwick**, 135 Wn.2d 820, 828, 959 P.2d 651 (1998) (citing **Barnes v. Cornerstone Invs., Inc.**, 54 Wn. App. 474, 478, 773 P.2d 884 (1989))).

Bevan, their predecessor in interest,⁷ and others with knowledge. The trial court erred – indeed, it abused its discretion – in denying the Meyers any opportunity to conduct crucial discovery.

F. The trial court's application of the Act deprived the Meyers of their fundamental right to procedural due process.

As suggested above, the trial court's improper – and indeed draconian – application of the Act in these circumstances violated the Meyers' fundamental right to procedural due process. Using the Act is certainly overkill if the goal is simply to clarify that a particular factual allegation is not the basis of a counterclaim. And the Legislature made allowances for discovery, but the trial court summarily denied the Meyers' request, without so much as entering a ruling. At a minimum, this Court should reverse and remand for specific discovery on the underlying issue whether Bevan acknowledged the boundary line. But this manifest error affecting the Meyers' constitutional right to due process merits reversal of the order striking and remand for trial.⁸

⁷ Indeed, the Meyers specifically averred that they had located their predecessor in interest in Utah, and Ms. Wagner had affirmed Bevan's statements about the boundary established on the ground; but she was in California caring for a dying family member, so they could not obtain a declaration from her in time. CP 129, 134-35.

⁸ The Meyers did not raise this issue below, primarily due to the rush to judgment – itself a manifestation of the deprivation of due process. But this Court may consider the issue under RAP 2.5(a)(3), and should do so here.

The Court is well aware of the necessary three-factor balancing test for determining what process is due:

- (1) The importance of the private interest affected;
- (2) The risk of erroneous deprivation through the procedures used, and the probable value of any additional or substitute procedural safeguards;
- (3) The importance of the state interest involved and the burdens which any additional or substitute procedural safeguards would impose on the state.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The U.S. Supreme Court has repeatedly stated “that due process is flexible and calls for such procedural protections as the particular situation demands.” ***Morrissey v. Brewer***, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *see also* ***Cafeteria Workers v. McElroy***, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

(1) The private interest affected here is ***the Meyers’ right to petition our courts***. The enormous risk of erroneous deprivation is manifest here: the trial court summarily struck a factual allegation, imposed a \$10,000 fine, and imposed nearly \$19,000 in attorney fees and costs, all without a minute of discovery. (2) Additional discovery plainly would have clarified the situation, permitting the Meyers simply to agree – as they did in amending

their counterclaim below – that their claims were not based on Anderson’s communications with KCHD.

(3) While the Act presents an important state interest, the Legislature itself provided for specific discovery as required. Plainly the Legislature thought that additional safeguards were necessary and would help protect access to justice. The trial court’s application of the Act – if not reversed – violates the Meyers’ right as litigants in our court system to procedural due process.

G. The trial court erred in granting sanctions, costs and attorney fees.

If the Court agrees with any of the above arguments, it should reverse the trial court’s imposition of the \$10,000 fine and award of costs and attorney fees to Bevan. If the Court agrees that the Act plainly does not apply and that Bevan’s references to hearsay emails, to irrelevant statements, and to even the Meyers’ Offer of Settlement, make clear that this motion was designed to prejudice the trial court and to delay these proceedings (*see, e.g.*, CP 122-24), then it should award the Meyers fees and costs on appeal. RCW 4.24.525(6)(b).

But even if the Court agreed with the trial court on all grounds, it nonetheless should reverse the award of attorney fees because Bevan's motion for fees was untimely under CR 54(d)(2):

Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, **the motion must be filed no later than 10 days after entry of judgment.** [Bolding added.]

The definitions in CR 54(a)(1) provide in part:

Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.

Bevan took almost three months to file her motion. CP 214.

The 10-day time limit under CR 54(d)(2) is "intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted." 4 Karl B. Tegland, WASH. PRAC.: *Rules Practice* § CR 54, Supp. 42 (5th ed. 2006 & Supp. 2012) (Drafters' comment on 2007 amendments to CR 54(d)(2)). Here, the opening brief would have been due before Bevan brought her motion, but for an attempt to discuss settlement. CP 215.

The trial court erred as a matter of law in determining that "CR 54 does not apply" here. CP 260. The trial court apparently

believed that even though CR 54 expressly (a) requires that a motion requesting fees “must be filed no later than 10 days after entry of judgment,” and (b) specifies that “judgment” includes “any . . . order from which an appeal lies,” the case is not “final,” so the Civil Rule does not apply. CP 260. This ruling directly contradicts the language of the Rule. It cannot stand.

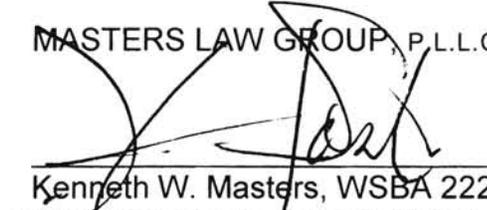
Nor did the trial court extend the time for filing the motion for fees, which might have been permitted under CR 54. Absent such a ruling, however, the fee motion was plainly untimely and should have been stricken. This Court should reverse the award.

CONCLUSION

For the reasons stated, this Court should hold that the Act does not apply and that Bevan failed in her burden, or that the Meyers met their burden or should be entitled to discovery, such that the trial court's application of the Act violated the Meyers fundamental right to due process. It should reverse the order striking a factual allegation that had already been removed from the Meyers' answer, reverse the \$10,000 sanction, and reverse the award of costs and fees to Bevan. If the Court agrees that the Act simply does not apply and that it was brought largely for purposes of delay, it should grant the Meyers costs and fees on appeal.

RESPECTFULLY SUBMITTED this 23rd day of April, 2013.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 23rd day of April 2013, to the following counsel of record at the following addresses:

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RCW 4.24.525

Public participation lawsuits — Special motion to strike claim — Damages, costs, attorneys' fees, other relief — Definitions.

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative,

executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4) (a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5) (a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6) (a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

, . . .

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

[2010 c 118 § 2.]

CR 54. Judgments and costs

(a) Definitions.

(1) *Judgment.* A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) *Order.* Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his

pleadings.

(d) *Costs, disbursements, attorneys' fees, and expenses.*

(1) *Costs and disbursements.* Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) *Attorneys' fees and expenses.* Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) *Preparation of order or judgment.* The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) *Presentation.*

(1) *Time.* Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) *Notice of presentation.* No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and

served with a copy of the proposed order or judgment unless:

(A) *Emergency*. An emergency is shown to exist.

(B) *Approval*. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) *After verdict, etc.* If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

HISTORY: Prior: 54(e), RPPP Rule 54.04W and Rule 77.08W (1st sentence). Adopted May 5, 1967, effective July 1, 1967; amended, adopted June 12, 1989, effective Sept. 1, 1989; amended, effective September 1, 2007.